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No. 92-

In the Supreme Court of the United States

October Term, 1992

COMMONWEALTH OF MASSACHUSETTS, et al
Petitioners,

v.

GREENWOOD TRUST COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Congress preempt state consumer protection laws regulating late charges and other non-interest loan fees when it expressly preempted interest rate restrictions on state chartered banks through Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980?

2. After finding that the text and legislative history of an express preemption statute are "at bottom inconclusive" as to preemptive scope, may a court then define the preemptive scope broadly so as to find preemption?

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GREENWOOD TRUST COMPANY,
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PETITION FOR A WRIT OF CERTIORARI
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The Commonwealth of Massachusetts and the Attorney General of Massachusetts petition for a writ of certiorari to review the judgment of the Court of Appeals for the First Circuit, entered in this case on August 6, 1992.

OPINION BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 971 F.2d 818 and is reproduced as Appendix A

hereto. The decision of the United States District Court for the District of Massachusetts is reported at 776 F. Supp. 21 and is reproduced as Appendix C hereto. The final judgment under Fed. R. Civ. P. 54(b) and the "Supplement to the Court's Memorandum and Order of October 22, 1991" of the United States District Court are reproduced as Appendices B and D hereto, respectively. Appendices A-D are included in a separate Appendix.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on August 6, 1992. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1254(1) (1988). The respondent invoked District Court jurisdiction under 28 U.S.C. §§1331, 1332 and 1337.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. VI, cl. 2.

12 U.S.C. §1831d(a) (1988 & Supp. 1990) provides, in pertinent part:

> In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this subsection, such State bank or such insured branch of a foreign bank may,

> notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank or such insured branch of a foreign bank is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

Mass. Gen. Laws Ann., ch. 140, §114B (West 1991) provides, in pertinent part:

> No creditor shall impose a delinquency charge, late charge, or similar charge on loans made pursuant to such an open end credit plan.

STATEMENT OF THE CASE

The facts giving rise to this controversy are undisputed. Greenwood Trust Company ("Greenwood"), a Delaware

state bank insured by the FDIC, issues the Discover Card to customers nationwide, including several hundred thousand Massachusetts residents. In addition to charging a monthly periodic rate of 1.65%, Greenwood imposes a $10.00 "late charge" if a required payment is not made within 20 days after the monthly payment due date. A Massachusetts consumer protection statute, Mass. Gen. Laws Ann., ch. 140, §114B (1991), prohibits credit card late charges. App. A - 6, 7.

On October 27, 1989, the Attorney General of Massachusetts sent written notice to Greenwood that Greenwood's imposition of late charges on its Massachusetts Discover Card customers violated the Massachusetts statute. Greenwood then filed a Complaint for Declaratory and Injunctive Relief in the

U.S. District Court for the District of Massachusetts, alleging that Delaware law allowed the imposition of credit card late charges on Massachusetts consumers, and that the Massachusetts statute was preempted by the Supremacy Clause of the United States Constitution and by Section 521 of the Depository Institutions Deregulation and Monetary Control Act ("Section 521" and "DIDA").[1/]

1/ Greenwood also alleged that its late charges did not violate the Massachusetts statute and that, pursuant to a choice of law provision in its Cardmember Agreement, more permissive Delaware law controlled its contractual relationships with its Massachusetts customers. Those allegations, which were rejected by the District Court in its Memorandum and Order of October 24, 1991 (App. C - 126), were not addressed by the Court of Appeals (App. A - 55), and are not at issue in this petition.

In its Answer and Counterclaim, Massachusetts denied that its late charge statute was preempted by federal law and asked the District Court for civil penalties and restitution of the late charges illegally collected.

On cross-motions for summary judgment, the District Court ruled in favor of the Commonwealth stating that Greenwood had not met its heavy burden of showing preemption. App. C - 84. The District Court held that "[t]he plain meaning of section 521 does not evince Congressional intent to preempt state regulation as to other credit terms, apart from interest rates, such as the late charges challenged by Massachusetts." App. C - 22,23. The court also noted that "[t]he record of Congressional debate and deliberation

concerning the enactment of DIDA is generally supportive of the Commonwealth's argument that preemption of credit card regulation under DIDA is confined to numerical interest rates." App. C - 33.

The District Court certified its rulings for Greenwood's interlocutory appeal under 28 U.S.C. §1292(b) (1988). The First Circuit accepted the certification, noting:

> In light of the pivotal importance and broad commercial consequence of the questions presented, we accepted the certification. (As an aside, we remark that our belief as to the importance of the questions presented has been validated to some degree by the outpouring of amicus briefs, some favoring appellant's position and some opposing it.) App. A - 8.

On August 6, 1992, the First Circuit reversed the District Court.

The First Circuit found the statute's "text and legislative history . . . at bottom, inconclusive." App. A - 41. The court went on to hold that the preemptive reach of DIDA goes beyond numerical percentage rates of interest, and preempts Massachusetts' law prohibiting credit card late charges.

REASONS FOR GRANTING THE WRIT

I. THE FIRST CIRCUIT'S OPINION MAY HAVE A DRAMATIC IMPACT ON THE TRADITIONAL STATE REGULATION OF LENDING PRACTICES.

The First Circuit's opinion, if allowed to stand, may result in the preemption of much state regulation of lending practices. Even the narrowest reasonable reading of the First Circuit's holding affects the allocation between consumers and the banking industry of hundreds of millions of dollars in late charges annually.

The First Circuit's ruling may place most loan-related charges beyond the reach of state regulation.[2/] States have, in fact, historically regulated many of these charges.[3/]

2/ The court's statement that a late charge is "related to the use or forbearance of money, or . . . damages for its detention", App. A - 25, 26 (emphasis added), implies that any state restriction of loan related charges affecting a lender's total return is preempted under §521. For example, charges for exceeding the credit limit, replacement card fees, and charges for duplicate statements are arguably all "related to" the use or forbearance of money (at least under the First Circuit's expansive reading of §521), "interest," and therefore exportable, regardless of the law of the cardholder's state. This analysis could also lead to the preemption, for example, of limitations on attorney's fees under state law.

3/ For example, Washington, since 1899, has restricted loan "setup charges." Wash. Rev. Code Ann. § 19.52.020 (Supp. 1992). New Mexico, since 1912, has restricted loan commissions. N.M. Stat. Ann. §56-8-7 (1978). South Carolina, since 1962, and Louisiana, since 1988, have restricted over-limit charges.

(footnote continued)

The First Circuit's opinion will encourage more and more lenders to flout long-standing state consumer protection laws. As state law enforcement officers attempt to fulfill their legitimate roles, they will be met by declaratory judgment actions citing Greenwood Trust.

Even read as limited to its facts, the First Circuit's opinion is of national importance. It holds that section 521 of DIDA preempts state regulation of late charges in open-end credit agreements with out-of-state banks and allows interstate

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(footnote continued)

S.C. Code Ann. §37-2-202(c)(ii) (Law Co-op. 1991); La. Rev. Stat. Ann. §3530(E) (West 1991). Congress recognized the state's historic role in this type of regulation when it passed the Truth in Lending Act -- a comprehensive scheme of lending regulation far broader than the usury deregulation in s.521. Aldens, Inc. v. Packel, 524 F.2d 38, 46 (3d Cir. 1975), cert. denied, 425 U.S. 943 (1976).

"exportation" of late charge deregulation. Given that most open-end credit agreements now cross state lines and originate from bank entities domiciled in low-regulation states,[4/]

4/ "Credit card loans at commercial banks in the United States increased by $72.4 billion from 1980 to 1987. Just two states accounted for half of that increase -- Delaware for $25.0 billion and South Dakota for $12.3 billion." See "Small States Teach a Big Banking Lesson," Chicago Fed Letter, June 1986. To achieve this result, the states repealed all consumer protection legislation applicable to consumer lending. In 1980, South Dakota removed all usury ceilings for credit card loans and other types of consumer lending. In 1981, Delaware eliminated interest rate ceilings on all types of loans and passed laws allowing banks to charge a variety of fees associated with the extension of credit. Id. See App. C-20.

The ten largest holders of bank card receivables hold 50.9% of the market share. Of the 10 largest holders of bank card receivables, six are located in Delaware and one is located in South Dakota. The six Delaware banks accounted for approximately 26% of the total bank card receivables in 1991; the one South Dakota bank accounted for

(footnote continued)

the result of this holding, in effect, is that states may no longer regulate late charges.

This derogation of the states' historically accepted police powers will have a very significant economic impact. Today, 32 states, as well as Puerto Rico and the District of Columbia, prohibit or significantly restrict credit card late charges. Six

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(footnote continued)

approximately 18%. Credit Card Management, Card Industry Directory: The Blue Book of the Credit and Debit Card Industry in the United States, 1992 ed., at 35, 68-72. Clearly, the residents of these two states, with populations of 594,000 and 708,000, ranking 47th and 45th in population size, respectively, do not account for these receivables. U.S. Department of Commerce, A Statistical Abstract Supplement: State and Metropolitan Area Data Book, 1986, 1986, at 504.

states prohibit late charges,[5] 24 states plus the District of Columbia and Puerto Rico impose percentage and/or total dollar limitations on such charges,[6]

5/ COLO. REV. STAT. §5-3-203NJ(5)(a) (1992); MASS. GEN. LAWS ANN. ch. 255, §12H (West 1988); N.J. STAT. ANN. §17:16C-50 (West 1984); 69 PA. CONS. STAT. ANN. §1906 (Purdon SUPP. 1992); TEX. REV. CIV. STAT. ANN. art. 5069-15.02(f), 3.15(8), 3.16(3) (Vernon 1987); VT. STAT. ANN. tit. 9, §2406(c) (1987)).

6/ ARIZ. REV. STAT. ANN. §44-6002G (SUPP. 1991); CONN. GEN. STAT. ANN. §§36-233(d), 36-233b (SUPP. 1992); D.C. CODE ANN. §28-3310 (1990); FLA. STAT. ANN. §520.35 (West 1988); GA. CODE ANN. §10-1-7 (1989); HAW. REV. STAT. §476-9 (1985); IND. CODE ANN. §24-4.5-3-203.5 (Burns 1991); IOWA CODE ANN. §537.2502(4) (West SUPP. 1992); KAN. STAT. ANN. §16a-2-502 (1988); KY. REV. STAT. ANN. §287.750 (Michie/Bobbs-Merrill 1988); LA. REV. STAT. ANN. §9:3527 (West 1991); ME. REV. STAT. ANN. tit. 9A, §§2-402, 2-501(3), 2-502 (SUPP. 1991); MD. COM. LAW CODE ANN. §12-506(6) (1990); MINN. STAT. ANN. §§48.185(d), 168.71(a)(3) (West SUPP. 1992); MISS. CODE ANN.

(footnote continued)

and two states specifically require such charges to be reasonable.[7/]

More than 79 million Americans hold one or more credit cards.[8/] Three-quarters of cardholders are "borrowers" who pay interest (finance) charges on their outstanding balances on

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(footnote continued)

§75-17-19(3) (1991); MO. ANN. STAT. §408.330(3) (Vernon SUPP. 1992); MONT. CODE ANN. §31-1-235 (1991); NEV. REV. STAT. §97.195 (1987); N.C. GEN. STAT. §24-11(d1) (1991); P.R. LAWS ANN. art. 19(B); S.C. CODE ANN. §37-3-203 (Law. Co-op. 1987); S.D.CODIFIED LAWS ANN. §54-6-61 (1990); UTAH CODE ANN. §70C-2-102 (SUPP. 1992); VA. CODE ANN. §6.1-330.80 (1988); W.VA. CODE §46A-3-113 (1992); WIS. STAT. ANN. §422.202(2m)(a) (1988)).

7/ CAL. CIV. CODE §1671(c)(d) (West 1985) interpreted in Beasley v. Wells Fargo Bank, N.A., 1 Cal. Rptr. 2d 446, 235 Cal. App. 3d 1383 (1991) review denied (Mar. 1992) (credit card late fees charged by National Bank were unreasonable in amount) and WASH. REV. CODE ANN. §63.14.090 (SUPP. 1992).

8/ The Nilson Report, Nov. 14, 1991 at 4.

a monthly basis.[9/] In 1991, those borrowers paid finance charges at an average annual rate of approximately 18%, although these rates have declined in recent months.[10/]

Sixty five percent of banks charge late fees to customers. These fees average over $8.00 per month.[11/] In 1991, credit card issuers billed to and received from consumers $858 million

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9/ See Ausubel, "The Failure of Competition in the Credit Card Market," The American Economic Review, March, 1991, at 71.

10/ See Credit Card Management, Card Industry Directory: The Blue Book of the Credit and Debit Card Industry in the United States, 1992 ed, at 35, 37.

11/ Stewart, "How Penalty Fees are Rewarding Banks," Credit Card Management, Nov. 1991, p.39.

in late charges.[12/] (It is safe to assume that a material share of these late charges are collected in apparent violation of the state law of the cardholder.)

Summarizing, millions of credit card customers pay late charges as well as high interest rates on their unpaid balances when they cannot or do not make

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12/ Business Week, Feb. 24, 1992 at 32. In 1981, there was $31.8 billion in outstanding debt on bank credit cards. See Credit Card Management, Card Industry Directory: The Blue Book of the Credit and Debit Card Industry in the United States, 1992 ed. at 26. By 1992, that figure had grown more than six times to $189 billion; the average outstanding balance on the major credit cards exceeds $1200. See New York Times, Business, September 13, 1992, at 13, citing Ram Research Corporation. Credit cards are now used to charge more than $200 billion for goods and services per year. The Nilson Report, Nov. 14, 1991, at 5. Credit cards also generated approximately $34.24 billion in revenues for the banking industry and $5.83 billion in pre-tax profits. Id.

timely monthly payments. Thirty two state legislatures have seen fit to strike a better balance between the average consumer and the credit card industry. The First Circuit's holding would void the thoughtful decisions of these policy-making bodies. The need for this Court's review is reinforced by pending litigation potentially affected by this ruling.[13/]

The First Circuit has broadly expanded the preemptive scope of DIDA. The logic and language of the First Circuit's opinion suggests that not only

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13/ The Commonwealth is aware of more than 20 actions, most of which are class actions, pending in seven jurisdictions, which turn on the resolution of the questions presented in this case. See Laing v. U.S., 423 U.S. 161, 167 (1976) (Solicitor General did not oppose petition for certiorari because 70 pending federal tax cases depended on resolution of conflict).

late charges, but many other loan-related charges and terms are now beyond the reach of state regulation. This interpretation would represent an extraordinary incursion on state law and state authority and may significantly alter the state/federal balance in banking regulation.

II. THE FIRST CIRCUIT'S DECISION DISREGARDED THE PLAIN LANGUAGE AND UNAMBIGUOUS LEGISLATIVE HISTORY OF DIDA.

The plain language of DIDA §521 allows federally insured state-chartered banks to export the "interest rate" ceiling of their home states to foreign states.[14/]

14/ The language of DIDA §521 is similar to the language of §85 of the National Bank Act, 12 U.S.C. §85 ("§85"). This Court held in Marquette National Bank v. First of Omaha Service Corp., 439 U.S. 299 (1978) that national banks could disregard other states' interest ceilings when doing business outside their home states.

Section 521 of DIDA reads in pertinent part as follows:

> [I]f the applicable rate prescribed in this subsection exceeds the rate such State bank . . . would be permitted to charge in the absence of this subsection, such State bank may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, . . . charge on any loan . . made . . . interest at [a federal ceiling] rate . . . or at the rate allowed by the laws of the State,... where the bank is located, whichever may be greater.

12 U.S.C. §1831d(a) (1988 & Supp. 1990).

Congress, in the language of §521, expressed its preemptory intent. The scope of that preemption is clearly limited to "interest." There is no expressed intent to reach beyond "interest" to deregulate late charges and other loan fees.

> The question at bottom is one of statutory intent, and we accordingly "begin with the language employed by Congress and the assumption that the

> ordinary meaning of that language accurately expresses the legislative purpose."

Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031, 2036 (1992) (quotation marks and citations omitted).

The straightforward -- "interest" means interest -- reading of the statute, which the District Court correctly applied, is consistent with the legislative history of DIDA. In 1980, Congress faced a very clear problem, and, in DIDA, crafted a very focused, simple solution. Before the Act, less-regulated deposit-taking institutions -- especially money market funds -- and the capital markets generally were offering extremely high interest rates on deposits and other fixed income investments. Many state banks were unable to offer competitive

rates for two reasons: (1) federal regulations limited the maximum interest rates state banks could pay on deposits; and (2) state usury laws limited the interest rates state banks could charge on loans. The usury laws reinforced the effect of the deposit rate regulations by making it unprofitable to offer competitive rates on deposits. The final result, very destructive to local economies, was that it was impossible for many state banks to make loans -- lack of cash in-flow on the deposit side (as a result of uncompetitive rates) made cash out-flow on the loan side impossible.

To solve this problem, Congress raised the legal ceilings on both

deposit and loan interest rates.[15/]

15/ In DIDA, Congress changed the financial system in "three particularly critical ways":

> The high interest rates available to savers from money market funds, certificates of deposits, and other instruments has sharply discouraged passbook savings accounts for those who can afford an alternative, and left the small saver dependent on his passbook account severely discriminated against. This bill will phase out interest rate ceilings to give small savers a better break and to encourage savings. At the same time it will broaden the services available from thrift institutions, and expand their opportunities for improving earnings.
>
> Usury ceilings in some 24 States have left lenders unable to lend and borrowers unable to borrow, diverting credit availability out of these states and distorting the economy in myriad ways. The bill lifts usury ceilings to reflect the realities of the marketplace and makes it possible for banks and thrift associations to continue necessary lending. The provisions protect States' rights by allowing States to restore the usury ceiling promptly if they wish to do so.

(footnote continued)

Title II of DIDA deregulated deposit interest rates; Title V deregulated loan interest rates. Each section of Title V deregulates rates for a particular type of loan. Section 521, in particular, deregulates loan interest rates for state chartered banks. It does not preempt late charges or other incidental loan charges. An analytic reading of §521 in conjunction with other sections of Title V and their legislative histories reinforces the conclusion that late charges are not preempted by §521. See the District Court's opinion in this case, App. C- 21 to 50.

Massachusetts' ban on late charges in no way "interferes with or is

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(footnote continued)

126 Cong. Rec. 6965 (March 27, 1980). Remarks of Rep. Henry S. Reuss, Chairman, Committee on Banking, Finance and Urban Affairs.

contrary to federal law" or Congress's purpose. Gade v. National Solid Wastes Management Association, 112 S.Ct. 2374, 2388 (1992). Massachusetts' late charge law does not limit Greenwood's abilities to charge and earn high interest rates on its loans, or to pay competitive rates on its deposits, or to supply adequate credit to the economy.

The Massachusetts prohibition against credit card late charges, enacted in 1981,[16/] does not limit bank interest income. It is a consumer protection law designed to bar what the Massachusetts legislature viewed as an

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16/ Mass. Gen. Laws Ann. ch. 140, §114B, amended by Mass. Stat. 1981, ch. 384, §1. See App C - 101 to 116.

unfair and deceptive practice.[17/] The Massachusetts statute was not preempted by Congress in DIDA.

Nonetheless, the First Circuit determined that Congress intended to preempt late charge laws. The First Circuit's fundamental error was to read state and federal cases applying usury laws as a guide to Congress's preemptive intent in enacting §521. Finding the

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17/ Massachusetts Representative Antoine Aguiar, Chairman of the Massachusetts Joint Committee on Banks and Banking, refers to late fees and similar fees as "the notorious hidden charges that we have fought for years to eliminate." State House News Service, October 26, 1981. App. C - 116. Consumers shopping for credit are often unaware of differences in late fee practices, because they do not intend or expect to make late payments. See Statement of Basis and Purpose for FTC Trade Regulation Rule Concerning Credit Practices, 16 C.F.R. 444 (49 Fed. Reg. 7789, March 1, 1984). Credit card advertising and marketing do not focus on late fees except when required by law. See 1988 Fair Credit and Charge Card Disclosure Act, 15 U.S.C. §1637.

statute and legislative history unclear, and finding no case law directly addressing the issue of whether late charges or other loan fees are preempted by §521 or §85 of the National Bank Act (12 U.S.C. §85),[18] the court turned to a completely distinct line of cases, cases analyzing how interest should be computed for the purpose of applying usury laws. Courts in these cases often broadly interpreted "interest" to cover a wide variety of charges.[19]

18/ The court did reference a recent preliminary late fee decision under the National Bank Act in Nelson v. Citibank, 794 F. Supp. 312, 318 (D. Minn. 1992). See also Hill v. Chemical Bank, Civ. Nos. 3-92-255, 3-92-387 (D. Minn. Aug. 4, 1992) and Tikkanen v. Citibank (South Dakota), N.A., Civ. Nos. 4-92-286, 4-92-287 (D.Minn. Sept. 10, 1992).

19/ In fact, many of these cases do not really stand for a broad definition of "interest" even in usury computation. For example, in Fisher v. First National

(footnote continued)

(footnote continued)

Bank, 548 F.2d 255 (8th Cir. 1977), the Eighth Circuit never decided the issue of whether a cash advance transaction fee was "interest." Instead, the Court of Appeals simply determined that a Nebraska bank was entitled to charge interest on its credit card accounts at the rate permitted to Nebraska small loan companies. The small loan interest rate was high enough to make the fee irrelevant. Similarly in Northway Lanes v. Hackley Union National Bank & Trust Co., 464 F.2d 855, 864 (6th Cir. 1972), the Sixth Circuit, in allowing a national bank operating in Michigan to impose front-end closing costs in conformity to Michigan state law governing state banks, did not consider or decide whether those charges were "interest." The Sixth Circuit also accepted the view that prepayment penalties, another form of post-transaction charges heavily regulated by states (see, e.g., Mass. Gen. Laws Ann. Ch. 255D §13 (West 1988)), are not interest and cannot make a nonusurious loan usurious. Id. Likewise, the opinion in First National Bank in Mena v. Nowlin, 509 F.2d 872 (8th Cir. 1975) did not offer an expanded definition of the term "rates," but merely deferred to state usury case law. But see National Bank v. Johnson 104 U.S. 271, 277 (1881); Evans v. National Bank, 251 U.S. 108 (1919). Also, for example, in American Timber & Trading Co. v. First National Bank, 690

(footnote continued)

These cases cannot provide guidance in preemption analysis. There is no question that in usury cases courts must include as interest some fees and charges associated with loans. Otherwise, usury laws would be easily circumvented by creative lenders. However, even if some of these fees and charges must be computed-in for usury purposes, they are not interest in the

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(footnote continued)

F. 2d 781 (9th Cir. 1982), the primary issue was how much money had been loaned, not whether the charge was properly considered "interest" (which, the bank conceded, should be defined with reference to federal, not state, law) while in Panos v. Smith, 116 F.2d 445 (6th Cir. 1940) and Cronkleton v. Hall, 66 F.2d 384 (8th Cir. 1933), the Courts of Appeals made unremarkable rulings that illegal front-end charges for mortgage taxes and recording fees (Panos) and bonuses or commissions (Cronkleton) were simply interest in disguise. None of these cases directly addressed the issue of the scope of preemption under §85, much less §521.

ordinary meaning of the word as used in §521. Nor was the relationship between those fees and interest construed in a preemption context in which the presumptions against preemption would apply. In sum, the usury cases provide no guide whatsoever as to the scope of Congress's preemptive intent. Neither DIDA nor the National Bank Act preempt state regulation of late charges and other charges not included within the plain meaning of the term "interest."

III. AFTER FINDING THAT "DIDA'S TEXT AND LEGISLATIVE HISTORY ARE, AT BOTTOM, INCONCLUSIVE," THE FIRST CIRCUIT SHOULD NOT HAVE FOUND PREEMPTION.

Section 521 contains no broadening language such as that recently interpreted in Morales, supra, 112 S. Ct. 2031 (1992) (Congressional preemption of state regulation "relating to" airline rates, routes or services).

It expressly preempts only limitations on "interest." The First Circuit explicitly found the absence of clear intent to preempt late charge laws, stating that "DIDA's text and legislative history are, at bottom, inconclusive." App. A - 41. The court's ultimate finding of preemption is thus inconsistent with the Supreme Court's recent preemption cases.

The First Circuit ignored the principle that "the historic police powers of the States are not to be superseded by . . . [the] Federal Act unless that is the clear and manifest purpose of congress." Cipollone v. Ligget Group, Inc., 112 S. Ct. 2608, 2617 (1992) (quotation marks and citations omitted). No "clear and manifest purpose" was found. In fact, the court found the exact opposite --

inconclusiveness.

The First Circuit read Cipollone incorrectly and created a novel approach to express preemption analysis.

> [S]o long as Congress's intent to effect preemption remains clear and manifest, uncertainty which pertains only to the contours of the ensuing preemption does not necessitate an alteration of a reviewing court's basic analytic approach.

App. A. - 19. In the quoted sentence, and in the actual course of its analysis, the court adopted the approach that once Congress has expressed an intent to preempt, the courts are largely free to define the scope of the preemption. This position goes beyond even the "ordinary meaning" standard suggested in Justice Scalia's Cipollone dissent:

> The proper rule of construction for express pre-emption provisions is, it seems to me, the one that is customary for statutory provisions

> in general: Their language should be given its ordinary meaning.

112 S.Ct at 2634. When, as in this case, after considering the ordinary meaning of terms, a court explicitly finds that the statutory text and legislative history are "inconclusive" as to Congressional intent to preempt a given area, this Court's rulings do not allow the court to continue an extended guessing exercise based on marginally relevant authority. The policy requiring a "clear and manifest purpose" to preempt must, at some point, be given effect.

The First Circuit's derivation of a broad preemptive scope for Section 521 conflicts with the Second Circuit's more proper analytic approach in Cable Television Association v. Finneran, 954 F.2d 91 (2d Cir. 1992). Although Congress had expressly preempted state

regulation of "rates for the provision of cable services," the Second Circuit nonetheless found that regulation of charges for downgrading cable services could be regulated by the states. Even though downgrading services is far more plausibly within the scope of "provision" than late charges are within the scope of "interest," the Second Circuit applied the correct standard for preemption analysis, stating:

> Where there are <u>persuasive indicia</u> that Congress intended exclusive federal regulation of the sphere in question, then the state act cannot stand . . . [Citations Omitted] . . . Absent such an intent, the state rule will only fall if it actually conflicts with the federal law.

954 F.2d at 95 (emphasis added). After finding no evidence of a broad preemptive intent in the language or legislative history of the cable

statute, the Second Circuit stopped and found there was no preemption. By contrast, the First Circuit continued its analysis through a discussion of marginally relevant state and federal usury cases after finding the statute and legislative history "inconclusive." This Court should grant the Petition for Certiorari to prevent other courts from following the First Circuit's approach to preemption analysis.

IV. THE FIRST CIRCUIT'S HOLDING IS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND OF OTHER CIRCUITS AS TO THE PREEMPTIVE SCOPE OF THE NATIONAL BANK ACT.

The First Circuit's finding of preemption conflicts with the long line of cases upholding dual state and federal regulation of National Banks. The §85 preemption of state law as

applied to National Banks should, if different, be broader than the §521 preemption of state law applied to state banks, given that National Banks, but not state banks, are "national favorites." App. C- 59. The breadth of the First Circuit's preemptive holding, if applied to National Banks, would conflict with other Circuit's analyses. A fortiori, the direct holding with respect to state-chartered banks conflicts with other Circuits.

The First Circuit gave insufficient weight to the rule that National Banks are, absent a conflict, subject to state laws: "This court has often pointed out that National Banks are subject to state laws, unless those laws infringe the national bank laws or impose an undue burden on the performance of the bank's

functions." Anderson National Bank v. Luckett, 321 U.S. 233, 248 (1944) (upholding a state escheat statute applied to a national bank). See also, U.S. v. Philadelphia National Bank, 374 U.S. 321, 328 (1963); Franklin National Bank v. New York, 347 U.S. 373, 378, n.7 (1954); Daggs v. Phoenix National Bank, 177 U.S. 549 (1900). Having made no finding of any actual conflict with federal law, the court should have followed the general principle of coexistence with state law laid out in the long line of National Bank cases.

The court's decision conflicts with those of other circuits that have analyzed alleged preemption of state consumer protection statutes under the National Bank Act. See e.g., National State Bank v. Long, 630 F.2d 981 (3d

Cir. 1980) (state anti-redlining statute not preempted; enforcement responsibility assigned to Comptroller of Currency); State of North Dakota v Merchants National Bank and Trust Co., 634 F.2d 368 (8th Cir. 1980) (en banc) (very narrowly limiting preemption of state unfair competition law to the area where it directly conflicted with the authority of the O.C.C.).

The First Circuit stands in direct opposition to the Supreme Court of California which held that California's unconscionability law could restrict charges for bounced checks -- charges analogous to late fees, but in a deposit, rather than loan, context. The court found that the restrictions neither conflicted with nor frustrated the purpose of the National Bank Act or DIDA and were not preempted. Perdue v.

Crocker National Bank, 702 P.2d 503, 520-24 (Cal. 1985), appeal dismissed, 475 U.S. 1001 (1986).

The First Circuit does, in a limited way, follow the coexistence rule in looking to Delaware for the definition of "interest." Delaware explicitly allows late charges "as interest." However, turning to Delaware to determine the preemptive scope of §521 begs the question of whether Congress intended to preempt late charge regulation. Only if Congress meant to preempt late charge restrictions would a §521 analysis then turn to the late charge laws of the bank's home state. Certainly, Congress did not intend to give each bank's home state the ability to control Congress' preemptive intent by controlling the definition of interest.

In First National Bank v. Dickinson, 396 U.S. 122 (1969), this Court confronted the issue whether federal or state law defined the term "branch" in the National Bank Act. This Court recognized that to permit state law to define the federal term "branch" would "make them the sole judges of their own powers" and that Congress "did not intend such an improbable result." 396 U.S. at 133-34.

That Congress did not specifically define "interest" in §521 does not mean it delegated the definitional role to the states. Congress did not intend for one state, by a unique definition of the term "interest" that includes delinquency charges and attorneys' fees for collection efforts, to preempt the consumer protection laws of all other

states. In fact, such a broad delegation would be "improbable." As noted by the district court, "Delaware does not enact law on behalf of Congress." App. C- 59, 60.

Marquette National Bank v. First of Omaha Service Corp., 439 U.S. 299 (1978), is not to the contrary -- Marquette simply construes the language of §85 which allows a National bank to choose the interest rate allowed by its home state. Marquette does not define the types of loan regulation within the preemptive scope of §85. Marquette preemption is limited factually to numerical interest rates, with no mention of the exportation of other credit card terms, such as late

charges.[20/] This petition should be granted to properly define the scope of this Court's holding in Marquette.

20/ The District Court noted that "Marquette's discussion of the National Bank Act does not teach a general dynamic of ever-expanding preemption or a Congressional strategy of uniform credit regulation which extends irresistibly to displace all state restrictions on state banks." App. C - 72. The deference that the First Circuit gave to unofficial informal opinion letters from the Office of the Comptroller of the Currency and the Federal Home Loan Bank Board (App. A - 52), that expand the preeemptive scope of Marquette, the National Bank Act, and DIDA, is not justified under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Deference is not warranted when, as here, the language of the statute is clear and there is no discernible Congressional intent to preempt. See, e.g., Demarest v. Manspeaker, 111 S.Ct. 599, 603 (1991). Perdue, supra, 707 P.2d at 519-520.

V. THE FIRST CIRCUIT'S CONSTRUCTION OF SECTION 521 OF DIDA, TO INCLUDE LATE CHARGES WITHIN THE TERM "INTEREST," CONFLICTS WITH THE TRUTH-IN-LENDING ACT AND OTHER RELEVANT AUTHORITY.

Even if the Court of Appeals' broad preemption logic were correct as applied to other incidental loan charges which might fairly be viewed as "interest," it would not be correct as applied to late charges. Late charges are not "interest" and regulation of them is not preempted by section 521. They are not "compensation for the use or forbearance of borrowed money", especially in credit card accounts. Greenwood continues to receive interest on its past due accounts, in addition to late charges. Late charges are contingent on lateness of payment, not on the making of the loan itself, and are therefore not to be included in evaluating the interest rate of the loan.

The federal Truth in Lending Act ("TILA"), 15 U.S.C. 1601 et seq., authoritatively defines consumer credit loan terms. Central to TILA is the "Finance Charge" which is a comprehensive economic measure of the borrower's costs of credit. The Finance Charge is defined as:

> . . . the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit . . . . Examples of charges which are included in the finance charge include...(1) Interest....

15 U.S.C.§ 1605(a) (emphasis added). "Finance charge" is a broader definition of the costs of credit than the traditional term "interest." Interest is only one component of the Finance Charge. Courts interpreting usury laws have often construed "interest" broadly to resemble Finance Charge. The First

Circuit mistakenly adopted such a broad construction to define the scope of §521 preemption.

Even a Finance Charge analysis would exclude late charges. Late charges, unlike interest, are not imposed "incident to the extension of credit"; rather they are imposed as a result of a late payment. The regulations implementing the Truth in Lending Act explicitly exclude late charges from the computation of "Finance Charge." 12 C.F.R. §226.4(c)(2). These regulations are completely consistent with the Congressional definition of "Finance Charge." Indeed, Congress was well aware of the recognized commercial distinction between finance charges incident to the extension of credit and delinquency charges. See Johnson v.

McCracken-Sturman Ford, Inc. 527 F.2d 257, 265-66 (3d Cir. 1975).

The Senate Report on DIDA specifically incorporated TILA terminology in its explication of §501, a sister provision to §521. S. Rep. No. 368, 96th Cong., 1st Sess. 19 (1979) ("We intend to exempt only those limitations that are included in the annual percentage rate") (emphasis added). In addition, Congress amended portions of TILA as part of the DIDA package. While TILA is not specifically cited in the legislative history of §521 per se, to read DIDA without reference to TILA "is to read it out of the context in which Congress enacted it." Cf. Allen v. Grand Central Aircraft Co., 347 U.S. 535, 541 (1954).

The common law points to the same conclusion that late charges are not interest. At common law, late fees typically were considered a form of contractual liquidated damages. The primary treatises, digests and case books on damages or on contracts have consistently treated liquidated damages, such as late fees, as a contract remedy distinct from "interest." See, e.g., Field, The Law of Damages Ch. 9 & §22 (1876); Williston, Contracts §§ 769-792 (1920) and § 781 (3d ed.); Corbin, Contracts § 1058; Sedgewick, Damages §§ 389-427 (9th ed. 1912); ALI, Restatement of Contracts § 339; U.C.C. § 2-718 (1983). The California Supreme Court succinctly described the differences in Garrett v. Coast and Southern Federal Savings and Loan Ass'n, 511 P.2d 1197 (Cal. 1973), where it noted:

> The fundamental difference between interest and penalty charges is that interest is a measure of compensation to which an obligee is entitled while a penalty is punitive in character. A penalty provision operates to compel performance of an act and usually becomes effective only in the event of default upon which a forfeiture is compelled without regard to the actual damages sustained by the party aggrieved by the breach.
>
> * * * * *
>
> We are compelled to conclude that a charge for the late payment of a loan installment which is measured against the unpaid balance of the loan must be deemed to be punitive in character. It is an attempt to coerce timely payment by a forfeiture which is not reasonably calculated to merely compensate the injured lender.

Id. at 1202-1203 (citations omitted).

See also Beasley v. Wells Fargo Bank, N.A., supra. Greenwood's late charges are not even measured against the unpaid balance -- they are a flat penalty charge.

Late charges are not "interest." Even under the First Circuit's erroneous approach to measuring the scope of §521 preemption, the court should not have preempted the Massachusetts prohibition of credit card late charges.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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